SUPREME COURT, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

No. 91-904

In The

Supreme Court of the United States

October Term, 1992

CONCRETE PIPE AND PRODUCTS
OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF ON THE MERITS

DENNIS R. MURPHY
JAMES M. NELSON*
C. KELLEY EVANS
(*Counsel of Record)

DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
P.O. Box 3034
Sacramento, CA 95812-3034
(916) 444-3910
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	SUBSTANTIVE DUE PROCESS	2
	A. CP&P Cannot Be Charged With Knowledge That Withdrawal Liability Was A Risk	3
	B. CP&P Did Not Agree To Pay For Or Insure Benefits Of Any CLPT Participant	4
	C. There Is No Link Between CP&P Or Its Employees and CLPT's Underfunding	6
	D. The Withdrawal Liability Formula Is Irrational As Applied	9
	1. CP&P Is Harmed By The Formula	10
	2. Pooling Of Assets vs. Pooling Of Liabilities	11
III.	THE TAKINGS ISSUE	11
IV.	PROCEDURAL DUE PROCESS	14
	A. The Trustees are Biased Decisionmakers	15
	B. The Presumptions Are Not Mere Burdens of Proof	17
	C. The Interest Rate Assumption	18
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960)..... 12

Carnation Co., Inc. v. Central States Pension Fund, 9 E.B.C. (BNA) 1409 (1988) (Nagle, Arb.) 19

Classic Coal Corp. v. U.M.W. 1950 and 1974 Pension Plans, 5 E.B.C. (BNA) 1449 (1984) (Nagle, Arb.) 18

Connolly v. PBGC, 419 F. Supp. 737 (C.D. Cal. 1976), *rev'd*, 581 F. 2d 729 (9th Cir. 1978).....4, 11

Connolly v. PBGC, 475 U.S. 211 (1986)..... 2, 12, 13, 14

Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1137 (1st Cir. 1985) 19

Local 144 Nursing Home Pension Fund v. Demisay, No. 91-610 12

Lochner v. New York, 198 U.S. 45 (1905)..... 12

Marshall v. Jerrico, Inc., 446 U.S. 328 (1980)..... 16

Nachman Corp. v. PBGC, 446 U.S. 359 (1980).... 4, 5, 12

Nebbia v. New York, 291 U.S. 502 (1934)..... 11

NLRB v. Amax Coal Co., 453 U.S. 322 (1981)..... 15

Palmer Cooking Coal Co. v. U.M.W. 1950 and 1974 Pension Plans, 5 E.B.C. (BNA) 2369 (1984) (Gordon, Arb.)..... 18

PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) . 2, 12, 13

Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935).....11, 12

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 11

TABLE OF AUTHORITIES – Continued

Page

Vinson & Elkins v. C.I.R., 99 T.C. No. 2, 15 E.B.C. (BNA) 1811 (1992)..... 17, 19, 20

Woodward Sand Co. v. Operating Engineers Pension Trust, 3 E.B.C. (BNA) 2351 (1982) (Kaufman, Arb.)..... 19

CONSTITUTION, STATUTES AND REGULATIONS

26 U.S.C. § 412(c)(3)(A)..... 19

29 U.S.C. § 157..... 5

29 U.S.C. § 186..... 3

29 U.S.C. § 1002(34) 3

29 U.S.C. § 1104(a)(1)(D)..... 3

29 U.S.C. § 1110..... 4

29 U.S.C. § 1393(a) 17, 19

29 U.S.C. § 1401..... 1, 14, 17

29 U.S.C. § 1401(a)(3)(A)..... 15

29 U.S.C. § 1401(a)(3)(B)..... 18

MISCELLANEOUS

Daily Labor Report (BNA) No. 145, at A2-A3, (July 28, 1992)..... 8

Hearings on P.B.G.C. Premium Program, before the Subcommittee on Oversight, Committee on Ways and Means, U.S. House of Representatives, August 1, 1991 (Testimony of Ronald J. Kubalanza, Executive Director, Central States, Southeast and Southwest Areas Pension Fund, at p. 4)..... 8

I.

INTRODUCTION[1]

CP&P challenged MPPAA because the statute violates the Fifth Amendment in three ways: (1) it constitutes an impermissible taking without just compensation as applied; (2) MPPAA violates petitioner's substantive due process rights as applied; and (3) the 29 U.S.C. § 1401 presumptions violate procedural due process by denying CP&P access to an impartial decision maker.

Respondent CLPT, the PBGC, and a number of other *amici* challenge CP&P's arguments on overlapping grounds. As to substantive due process and takings issues, CLPT asserts: (1) the Court has already decided these issues in *Connolly* and *Gray*; (2) CP&P knew about and agreed to assume CLPT's unfunded liabilities; and (3) the unfunded liability is at least partially due to the participation of CP&P's employees so that it can be charged a "fair share" of the liability. As to procedural due process, CLPT and its *amici* claim: (1) CLPT's trustees are not decisionmakers; (2) CLPT's trustees are not biased; and (3) the provisions of 29 U.S.C. § 1401 are not presumptions, but rather burdens of proof.

The facts, however, pierce the rhetoric and sharpen the focus on the issues. First, CP&P paid $1.20 per hour in contributions yet CLPT admits it costs no more than 64.8¢ per hour to administer and cover the benefits earned by the employee.[2] Second, CP&P's employees received no

---

[1] Petitioner uses the same abbreviations for the parties, the 1974 and 1980 Acts, and this Court's prior withdrawal liability cases as it used in its Brief on the Merits.

[2] CLPT Br. at p. 11; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 24. Before the 1980 benefit increase the cost estimate was 58.1¢ per hour. *Id.* at Ex. E, 23.

past service credits for CP&P employment nor were there benefit increases during CP&P's contribution to CLPT. Third, CP&P's August, 1979 decision to close the Shafter facility irrevocably lead to the withdrawal and this decision was made and implemented before mandatory PBGC coverage of multiemployer plans under ERISA became effective and more than a year before MPPAA was enacted.

II.

SUBSTANTIVE DUE PROCESS

The briefs of CLPT and its *amici* could lead the Court to wonder why it granted certiorari. If it is so clear that *Connally*[3] and *Gray*[4] control the outcome, why did a minimum of four justices agree to hear this case? Indeed, since CP&P's position is so lacking in "octane," one wonders why the court has cluttered its docket with such an unworthy case?

The answer is that this is an "as applied" case, and the facts which distinguish this case from *Connolly* and *Gray* include the fact that none of the unfunded liability is attributable to CP&P's employees. CP&P did not knowingly or mistakenly agree to assume the unfunded liability resulting from the participation in CLPT of other employers and their employees.

---

[3] *Connolly v. PBGC*, 475 U.S. 211 (1986) (hereafter "*Connolly*").

[4] *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (hereafter "Gray").

A. CP&P Cannot Be Charged With Knowledge That Withdrawal Liability Was A Risk.

In December, 1976, when CP&P was created and began contributing to CLPT, it had no notice that it might be subject to a statute that would require it to pay for the pensions of other employers' employees. The plan documents themselves unequivocally stated that no such liability could or would exist. J.A. 80-81 at ¶ 32. The CLPT trustees themselves did not understand that the plan created a potential for unfunded liability. A contrary understanding would mean that the plan document was fraudulent because it declared that the plan was created, negotiated and was intended to continue to be a defined contribution plan and trust. J.A. 82 at ¶ 34. CLPT concedes that it understood, at that time, that it was a defined contribution plan (which limited its liabilities to the hourly contribution made). This was consistent with the understanding of the collective bargaining parties. CLPT Br. at p. 9.

Defined contribution or individual account plans are clearly permitted under ERISA. 29 U.S.C. § 1002(34). Nothing in ERISA or section 302 of the Taft-Hartley Act[5] prohibits a multiemployer plan from being an individual account or defined contribution plan. Thus, CLPT's and PBGC's "if permitted by ERISA" argument proves too much because it leads the Court to conclude that if CLPT is a defined benefit plan, the CLPT's trustees breached their fiduciary duty under 29 U.S.C. § 1104(a)(1)(D) by failing to operate the plan in conformity with the clearly expressed intention of the plan documents.[6]

---

[5] 29 U.S.C. § 186.

[6] *See* J.A. 80-82. The failure or refusal of CLPT's trustees to comply with the trust agreement and Article X, § E(4) of the

CLPT and PBGC assert that CP&P's president was aware of ERISA in 1976 and was thus on notice that withdrawal liability would be assessed. This assumes, of course, that CP&P's president was more competent at interpreting ERISA as applied to Taft-Hartley pension plans than CLPT's trustees or federal judges. At the time CP&P entered the plan in 1976, the same District Court from which this case originated had expressly held that plans like CLPT were individual account plans. *Connolly v. PBGC* 419 F. Supp. 737 (C.D. Cal. 1976), *rev'd*, 581 F.2d 729 (9th Cir. 1978). In 1980, this Court recognized in *Nachman*[7] that the understanding of employers in plans of this nature was that liability was limited. Indeed, as the concurring opinion in *Connolly* notes, the status of Taft-Hartley plans like CLPT was unsettled in 1984. The defined benefit or defined contribution status of CLPT has not been resolved conclusively in this case.

B. CP&P Did Not Agree To Pay For Or Insure Benefits Of Any CLPT Participant.

CP&P did not "agree" to enter a joint venture or be liable for the failure of the trustees to limit the CLPT benefit structure to the available assets. CP&P was not required to provide past service credits dating back to 1937 and benefit increases enjoyed by the employees of other employers. A joint venture is necessarily a creature of contract. CP&P did not agree to pay for decades of service for other people's employees. Thus, the "joint venture" analogy fails miserably.

1977-1980 Laborers' Craft Master Labor Agreement should not permit CLPT to seize CP&P's assets to pay for the CLPT fiduciaries' breach of their statutory duty. *Accord* 29 U.S.C. § 1110.

[7] *Nachman Corp. v. PBGC*, 446 U.S. 359, 378 n.28 (1980).

The "life insurance" analogy does not work either. In effect, CLPT, PBGC and others argue that it is appropriate to exact additional premiums from the insurance policy owner if an insurance company becomes insolvent and incapable of paying the benefits it agreed to pay to other beneficiaries. CP&P knows of no instance where an insurance company has successfully attempted to exact additional premiums from the policyholder in this circumstance. If it were allowed to occur, the purchase of life insurance would not create financial security as expected, but would instead create financial insecurity by converting an intended asset into an unintended and open-ended liability. Insurance policy owners would be as surprised as CP&P to discover that they purchased the risk of funding all the benefits of beneficiaries of all other policies issued.

The truth is that CP&P did not even have knowledge of the possibility of unfunded liability at the time it closed its plant, laid off all employees covered by the plan, and started the irrevocable chain of events that forced its withdrawal from the plan. All of this occurred in August, 1979, before this Court's decision in *Nachman* and a year before passage of MPPAA. The chain of events could not be reversed later because it is illegal to force union representation on employees when a majority of those employees do not desire to be represented by the union.[8]

The effort to explain why withdrawal liability here is not retroactive simply underscores the merit of CP&P's position. CLPT has quoted to the Court various documents which strictly limit contributing employer liability to the amount of the hourly contribution in the collective

---

[8] 29 U.S.C. § 157.

bargaining agreement.[9] CLPT has never defaulted on any loan or other obligation or failed to pay a pension benefit when due.[10] CLPT has never been financially incapable of paying any scheduled benefit to any of its beneficiaries. J.A. 79 at ¶ 26. In fact, CLPT's records reflect that the fund was earning or obtaining more funds as assets than it paid out on benefits during every year of its existence from 1962 through 1981 with one exception. J.A. 342-343; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 21. Thus, there is nothing in the records of CLPT which is inconsistent with all parties' belief that CLPT was telling the truth when it said it was a defined contribution plan. Nothing would have led an inquiring employer to believe that participation was likely to lead to potentially catastrophic liability at the time of withdrawal even under the pre-MPPAA rules of ERISA which were not mandatory.

C. There Is No Link Between CP&P Or Its Employees and CLPT's Underfunding.

There is no stretch of the facts which permits a conclusion that the unfunded vested liability of CLPT is attributable to CP&P participation. CLPT concedes that its unfunded liability is attributable, among other things, to past service credit for hours worked as long ago as 1937, even though no contributions were made to fund those credits at the time the plan was created in 1963.[11]

---

[9] *See* J.A. 80-81 at ¶¶ 32, 33, and 34.

[10] J.A. 79 at ¶ 25.

[11] Perhaps as important, a year of credited service for these past service credits was worth $2.67 a month in 1963. The maximum benefit regardless of years of service was $53.40. Following the 1980 benefit increase, a year of past service credit was increased in value to $35.64 per month with no maximum pension amount. CLPT Br. at p.8.

Since CP&P did not exist until December, 1976, none of the past service credits are attributable to its employees or its operations. No increase in benefits occurred while CP&P was producing pipe and contributing to the plan. Thus, none of the unfunded benefits existing in the plan can be said to be CP&P's fault or responsibility.

As importantly, even if it is assumed contrary to fact that any CP&P employee was earning vested service, CP&P paid more than adequate contributions to cover the cost of benefits earned plus the administrative expense. CP&P contributed $1.20 per hour for each covered hour of service. J.A. 76 at ¶ 10. CLPT's actuary computed that it cost 57.7¢ per hour to fund the pension benefit (even after the 1980 increase) for the employee who worked the hour that generated the contribution, and 7.1¢ per hour to administer the plan.[12] Thus, CLPT's cost for providing the benefit to the employee who worked the hour resulting in the contribution was 64.8¢ per hour.

CLPT used CP&P's extra 55.2¢ per hour to pay for unfunded vested benefits in the trust prior to CP&P's creation.[13] Thus, if viewed from the perspective of the liabilities attributable to CP&P or its employees, it is clear that CP&P has funded those benefits with hourly contributions nearly twice that required to pay for the benefit and administrative costs.

Amicus N.C.C.M.P asserts accurately that "each withdrawing employer pays for the unfunded vested benefits

---

[12] CLPT Br. at p. 11; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 24.

[13] CLPT Br. at p. 11; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 24.

of employee-participants which are not necessarily its own."[14] *Amicus* Central States takes this concept one step further: "the statute does not, and was not intended to, impose liability with mathematical precision to account for an employer's own employees' earned benefits."[15] The position staked out by CLPT, PBGC, and the other *amici* is that CP&P's "fair" or "proportionate" share of unfunded vested liability can be unrelated either to the benefits to be paid to CP&P employees, the extent CP&P funded the benefits or the amount of liability CLPT incurred as a result of CP&P's conduct.

Thus, there is no dispute that CP&P is being assessed withdrawal liability to pay for pre-ERISA retirement benefits for other employers' employees. Of course, even if CLPT wins, the CP&P assets seized would not be used to fund vested liability. Instead, these assets will be used to pay for benefit increases for other employers' employees. CLPT's actuary admitted that key assumptions are designed to achieve this result. J.A. 223. CLPT's unfunded liability remains at approximately the same $500 million level as existed in 1981.[16] Indeed *Amicus* Central States has told Congress that it believes it has a fiduciary duty to increase benefits when additional contributions are received rather than to reduce the unfunded liability.[17]

---

[14] N.C.C.M.P. at p. 7 n. 2.

[15] Central States Br. at p. 6.

[16] *See* Daily Labor Report (BNA) No. 145, at A2-A3, (July 28, 1992).

[17] Hearings on P.B.G.C. Premium Program, before the Subcommittee on Oversight, Committee on Ways and Means, U.S. House of Representatives, August 1, 1991 (Testimony of Ronald J. Kubalanza, Executive Director, Central States, Southeast and Southwest Areas Pension Fund, at p. 4).

The withdrawal liability assessment here is unconstitutional because CP&P, under these circumstances, is no different from any other citizen of the United States. There is no escape from the conclusion that if this Court upholds MPPAA, as applied here, it must do so recognizing that CP&P is being charged with a bill completely divorced from its conduct and which, if paid, will fund the pensions of other people's employees.

D. The Withdrawal Liability Formula Is Irrational As Applied.

There are two perspectives from which to examine the formula as applied to CP&P. One can examine the actual financial impact which CP&P's participation in CLPT had on the unfunded vested liability. Alternatively, the Court can conclude that Congress intended to fix the PBGC funding problem created by ERISA by taking assets from CP&P for the purpose of funding retirement benefits to people CP&P never heard of based on a promise which Congress, not CP&P, made. If this latter approach is used, the conclusion that there is an unconstitutional taking, as applied, becomes virtually unescapable.

CLPT and PBGC attempt to support the rationality of the withdrawal liability formula with three arguments which are simply not supported by the facts. First, CLPT claims that there is no evidence that the formula adversely impacted upon CP&P. Second, CLPT claims that increased contributions lead to increased benefits by CP&P's employees.[18] Third, PBGC claims that, in the long

---

[18] Based upon undisputed facts, CLPT's argument is incorrect. CLPT notes: "the pension benefit payable for one who retires is a flat monthly benefit multiplied by the number of

run, contributions will approach the value of liabilities attributable to the contributing employer.[19]

1. CP&P Is Harmed By The Formula.

CP&P was clearly harmed by the irrational linkage between contributions and presumed liabilities. The example of doubling the contributions to demonstrate the irrationality of the statute was not selected arbitrarily. 54% of CP&P's contributions were estimated to be needed to fund the pension benefit and administrative cost pursuant to CLPT's actuary. CLPT used the remaining 46% of contributions to achieve other goals. If the amount CP&P contributed in excess of that necessary to fund the benefit plus administrative cost is subtracted from CP&P's total contributions and the liability recalculated, the resulting withdrawal liability drops to less than $55,750.00.[20] Thus the suggestion that CP&P has not suffered from the payment of contribution levels higher than those which

---

years of credited service." CLPT Br. at p. 7. There is nothing in the formula which links the amount of monthly pension benefit the retires receives to the amount his employers contributed per hour on the employee's behalf. Indeed, the absence of this linkage is the crux of the problem.

[19] The facts of this case demonstrate both the fallacy of this concept and the PBGC's true belief about the reckless behavior of CLPT's trustees. The only way this prophecy can come true is if CLPT granted benefit increases which are so large that they consume CP&P's funding and are otherwise unjustified by the assets of the plan.

[20] The precise number is either $55,737.90 or $55,702.72 depending on whether the contributions in excess of those need to fund and administer the benefit are also deducted from gross contributions. See Appendix to Reply Brief.

CLPT's actuary computed were necessary to pay for the benefit and administrative cost is simply false.

2. Pooling Of Assets vs. Pooling Of Liabilities.

PBGC argues that "pooling" is an integral part of all multiemployer plans and thus this formula is rational. Although the support for this proposition is dubious,[21] the argument has no impact here. CP&P paid fully for any benefits it may have received from CLPT. Individual account plans (like that which CLPT held itself out to be) pool assets to maximize gains through investment but generate no "pooled" employer liability.

CP&P paid nearly half of its hourly contribution rate for the "privilege" of participating in this arrangement. The suggestion that somehow this near double payment was insufficient is arbitrary and irrational, as is the formula which leads to this situation. As applied, the "real and substantial relation" between the means Congress selected and the goal it sought to obtain is clearly lacking. *See Nebbia v. New York*, 291 U.S. 502, 525 (1934).

III.

THE TAKINGS ISSUE

The purpose of forbidding uncompensated takings of private property for public use is to bar government from forcing some people alone to be public burdens which, in

---

[21] The Court specifically rejected use of the pooling concept as a justification for imposing pension liability on all employers in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 357 (1935). The Court had the opportunity to repudiate *Alton* and its reasoning on this point in both *Connolly* and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and took some care to avoid doing so.

all fairness and justice, should be borne by the public as a whole. *Connolly*, 475 U.S. at 227 (1986); *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Long ago, this Court held that:

> There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or *to pension its employees*. (Emphasis added.) *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 357 (1935).

This Court was quite specific in *Connolly* in noting that it was unprepared to find that MPPAA *always* perpetrated a taking which would require compensation under the Fifth Amendment. Similarly, the Court did not find that MPPAA could *never* perpetuate a taking requiring compensation.

Having had all manner of arguments attributed to CP&P by respondent and its *amici*, it is important to define that which this Court need *not* do to grant CP&P relief. First, the Court is not asked to return to the *Lochner*[22] era, or resolve squabbles between the various parties submitting Amicus Briefs.[23] The court need not reverse *Connolly*, *Gray* or *Nachman*. Finally, this Court need not adopt broad or sweeping rulings which would

---

[22] *Lochner v. New York*, 198 U.S. 45 (1905). CP&P is also unprepared to concede that all of this Court's constitutional decisions during this period were so fatally flawed that no degree of consideration of these cases is appropriate.

[23] Thus, the Court need not decide the dispute between *amici* MPPAA Solvency Coalition and Central States as to whether the latter is a well run operation or very large Ponzi scheme. Similarly, Central States' quarrel with Lady Baltimore Foods and its views on the merits of the issues in *Local 144 Nursing Home Pension Fund v. Demisay*, No. 91-610, have no bearing on this dispute.

vitiate the integrity of the multiemployer pension plan system as CLPT's *amici* suggest.

The Court will need not define the constitutional limit on compelling citizens to pay for unrelated economic burdens Congress created. The Court should decide what "fair share of the Plan's unfunded liabilities"[24] means in the context of this small employer with a brief contribution history and no role in underfunding. If the fair share is defined as paying for actual or even potential liabilities which the employer leaves behind at withdrawal, it is clear that CP&P's hourly contributions were more than sufficient and seizure of anything more could not be for the purpose of funding a "fair share." If, on the other hand, "fair share" in this context means that an employer like CP&P must pay for other employers' employees, then the statute is clearly shifting to private individuals burdens which should be borne by the public at large.

CLPT's emphasis on the fact that ERISA (as opposed to MPPAA) existed before CP&P began contributing to avoid the obvious retroactivity of MPPAA, as applied, is misplaced. It is difficult to conceive of a set of documents drafted to confirm more clearly the intention of all parties that a pension plan be an individual account rather than a defined benefit plan.

The concerns of some members of Congress as restated in the *Connolly* concurrence have proven to be prophetic understatements. Representative Erlenborn was concerned that MPPAA may have:

> Taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said "It

---

[24] *Connolly*, 475 U.S. at 231 (O'Connor, J. and Powell, J. concurring), quoting *Gray*, 467 U.S. at 723 n.3.

> is a duck." . . . It is treating the multi-employer plans where you negotiate a contribution as having put a legal obligation on the employer to reach a level of benefits that has caused the problem.[25]

Here, not only did CLPT not look like a defined benefit "duck," walk like a defined benefit "duck," or quack like a defined benefit "duck," this beast further *declared* to all potential contributing employers that it was not a defined benefit "duck" and would not become a defined benefit "duck" so long as ERISA permitted defined contribution or individual account plans which both ERISA and MPPAA permit. The claim that CP&P should have known in 1976, 1978, or the date it made its last contribution that CLPT was a defined benefit plan is simply unsupportable.

IV.

PROCEDURAL DUE PROCESS

There is a difference between a burden of proof and a barrier to proof. Similarly, there is a difference between proving the existence of a fact and disproving the accuracy of a belief.[26] The problem with the 29 U.S.C. § 1401 presumptions[27] is that CLPT is permitted and encouraged

---

[25] *Connolly*, 475 U.S. at 234 (O'Connor, J., and Powell, J. concurring).

[26] For example, whether a church or temple physically exists is a fact. Whether the religious practices which occur inside the structure are "correct" or "reasonable" is a belief which is impervious to objective verification in this world.

[27] All the 29 U.S.C. § 1401 presumptions are at issue. The District Court reviewed the arbitrator's decision applying both sets of arbitrator presumptions. J.A. 419, 423. The arbitrator applied the actuarial presumptions (J.A. 400) and refused to consider the constitutionality of the presumptions generally. J.A. 386. The arbitrator's decision does not disclose the extent to which the 29 U.S.C. § 1401(a)(3)(A) presumption influenced the outcome of his decision. Clearly, if one or more of the presumptions is found unconstitutional, the entire withdrawal liability assessment mechanism may fail or be severed. Thus, CP&P strongly disagrees with the assertion by CLPT and its *amici* that the date of withdrawal is a dead issue.

to convert its beliefs or predictions about the future into irrebuttable facts.[28] A withdrawing employer is required to prove that CLPT's prediction of the future cannot possibly come true.

A. The Trustees are Biased Decisionmakers.

The contention that CLPT does not engage in biased judicial or quasi-judicial decision making is inaccurate. CLPT's bias against withdrawing employers like CLPT is inherent. As this Court held, CLPT's trustees owe fiduciary duties to the trust which are "antithetical" to the interests of the contributing employers. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334 (1981). Under CLPT's view of MPPAA, the withdrawing employer is cutting the plan off from a stream of income, and the trustees' duty is to seize assets equivalent to that income stream in the form of

---

[28] There is no dispute that CP&P has the right to an impartial decisionmaker. CLPT claims that it is not a decisionmaker and, somewhat half-heartedly, that it is not biased. PBGC echoes this assertion and adds that the plan actuaries, not the trustees, make the decision. The briefs of the Philadelphia Teamsters Pension Trust and the Central States Teamsters' Pension Trust add little new material. However, the difficulty which the various Teamsters Pension Trusts seem to be having among themselves as to whether the presumptions are even important underscores the fact that this issue is more complex than a simple squabble over the burden of proof.

withdrawal liability. As importantly, CLPT's abuse of interest rate assumptions to fund future benefits at the expense of withdrawing employers should be more than adequate to establish CLPT's bias against withdrawing employers. The existence of fiduciary duties "antithetical" to CP&P *is* bias.

As to the trustees' "decisionmaker" status, CLPT and its *amici* have it exactly backwards. Absent the presumptions, CLPT would not be a judicial decisionmaker for Fifth Amendment purposes. However, when the district court presumes that the arbitrator is correct, and the arbitrator presumes that CLPT is correct, the cascading presumptions transfer the judicial decision making authority back to the CLPT trustees.[29] Another way the court can dispatch the "lack of decisionmaking" argument is by noting that neither CLPT nor any of its supporting *amici* can discuss the lack of judicial decisionmaking without referring to the trustees' "determination" in the next breath.

The question is not whether CLPT is biased or a judicial or quasi-judicial decisionmaker. Rather the question is whether something in the MPPAA dispute resolution structure insulates withdrawing employers from that bias in the way that the *de novo* hearing insulated employers from the bias in *Marshall v. Jerrico*, 446 U.S. 328 (1980). The answer is that there is no such protection.

---

[29] This situation is easily distinguished from *Marshall v. Jerrico, Inc.*, 446 U.S. 328 (1980). In *Marshall*, the Department of Labor penalty was reviewed *de novo* by an administrative law judge. Here, no phase of a MPPAA dispute occurs *de novo*.

B. The Presumptions Are Not Mere Burdens of Proof.

The argument that the presumptions are simply burdens of proof conflicts with the plain meaning of the statutory language. CLPT trustees, for example, have a duty to use reasonable actuarial assumptions.[30] Absent the presumptions, this duty would still exist and the question would be whether CLPT or CP&P had the burden of proof regarding reasonableness.[31] The presumptions in 29 U.S.C. § 1401 are different.

The presumptions are analytical armor which shield the plan's decisions from close scrutiny as Congress clearly intended. Thus, as difficult as many of the withdrawal liability factual questions and actuarial assumptions are when viewed objectively, the presumptions become barriers to proof because of the inherent subjectivity involved. Whether CP&P withdrew before or after MPPAA's effective date is a factual question, but the components which go into deciding that question against CP&P here focused on CLPT's beliefs regarding CP&P's intentions. The interest rate actuarial assumption is intensely subjective and tends to be impervious to challenge within an unacceptably broad range of reasonableness. That PBGC has delegated its authority to set objective standards by inaction certainly does not help matters. *See* PBGC Br. at p. 7. It is the armor plating that the presumptions place on CLPT's determinations which renders the presumptions an unconstitutional denial of procedural due process.

---

[30] 29 U.S.C. § 1393(a).

[31] Indeed, this was the process and the issue in *Vinson & Elkins v. C.I.R.*, 99 T.C. No. 2, 15 E.B.C. (BNA) 1811 (1992).

That a few withdrawing employers have triumphed in limited areas does not eliminate the inherent constitutional infirmity. The listing of arbitration decisions where the employer prevails serves only to indicate how rare this event is and the narrowness of the available areas of challenge. Few of these cases reflect instances where the interest rate assumption has been successfully challenged. So long as the "range of reasonableness" for interest rate assumptions can result in either a fully funded plan or one which has serious unfunded liability depending on the actuaries belief structure, the presumptions and the inherent bias of the trustees remain a problem of constitutional dimension.[32]

C. The Interest Rate Assumption.

The most conceptually difficult presumption is that which protects the interest rate actuarial assumption.[33] CP&P has no quarrel with the actuarial profession or its professionalism within the bounds of what actuaries do. Nonetheless, the methods which actuaries use tend to cause the mind's eye to glaze over and obscure the subjectivity of the interest rate assumption and its inherent limitations. The parties here may disagree as to what the rate should be, but there is no denying the fact that the

---

[32] Compare, for example, *Classic Coal Corp. v. U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 1449 (1984) (Nagle, Arb.) with *Palmer Coking Coal Co. v. U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 2369 (1984) (Gordon, Arb.) where two arbitrators examined the same plan and assumptions but came to opposite conclusions regarding the reasonableness of the same interest rate.

[33] 29 U.S.C. § 1401(a)(3)(B).

outcome is simply an educated guess about the future. CLPT Br. at p. 29.

The only way to counter one belief in this regard is to present another. Absent an objective benchmark in the form of PBGC regulations, arbitrators either defer, pursuant to the presumption, to the plan actuary's guess about the future as happened here, or reject that guess and pick a different number. *See Woodward Sand Co. v. Operating Engineers Pension Trust*, 3 E.B.C. (BNA) 2351 (1982) (Kaufman, Arb.) (arbitrator concludes 6.5% is unreasonable, but 7.9% is reasonable without any analysis).

Two cases illustrate the problem. *Carnation Co., Inc. v. Central States Pension Fund*, 9 E.B.C. (BNA) 1409, 1438-1444 (1988) (Nagle, Arb.) recounts how four different actuaries applying four different approaches derived four different best estimates of the appropriate interest rate to be used ranging between 7.6% and 12.89%.[34] Each of the actuaries were, no doubt, upholding the highest standards of the profession, yet came to radically divergent outcomes. All claimed to be within the "range of reasonableness," but each set of assumptions would result in a significant change in the amount of the withdrawal liability.

The other case is *Vinson & Elkins v. C.I.R.*, 99, T.C. No. 2, 15 E.B.C. (BNA) 1811 (1992).[35] Like CP&P, the IRS has an interest in seeing that the interest rate assumptions are not unreasonably low. IRS asserted that the plan's interest rate

---

[34] Thus, the "range of reasonableness" between 7.5% and 14.5% noted in *Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137, 1150 (1st Cir. 1985) (Aldrich J., dissenting) is neither unusual nor aberrational.

[35] CP&P agrees that the standard governing actuarial assumptions for tax purposes under 26 U.S.C. § 412(c)(3)(A) is virtually identical to the standard for withdrawal liability assumptions in 29 U.S.C. § 1393(a).

assumptions were too low relying, *inter alia,* on testimony from an actuary who used the same methodology as CP&P's actuary here.[36] IRS, unhindered by the statutory presumption, was unable to overcome the standard because of the inherent subjectivity of the belief structure necessary to assume a future interest rate.[37] The significance of *Vinson & Elkins* is not the outcome, but rather that the IRS and PBGC disagree on what is reasonable, and both agencies apply virtually identically worded statutes.

V.

CONCLUSION

CP&P respectfully urges the Court to reverse the decision of the Ninth Circuit in this case.

Dated: October 9, 1992

Respectfully submitted,

DENNIS R. MURPHY
JAMES M. NELSON*
C. KELLEY EVANS
(*Counsel of Record)
DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
Post Office Box 3034
Sacramento, CA 95812-3034
(916) 444-3910
Counsel for Petitioner

---

[36] *See, Vinson & Elkins,* 15 E.B.C. at 1820-1821, 1826-1827.

[37] Ironically, one of the excuses used for discounting the reliability of the IRS' actuary who used the same methodology as CP&P's actuary was that the IRS actuary's primary experience was with large multiemployer plans like CLPT. Thus CP&P's actuary was ignored because his experience was primarily in non-multiemployer plans and the IRS' actuary was ignored in a single-employer situation because of that actuary's multiemployer experience when both actuaries used the same emthodology.

APPENDIX

Withdrawal Liability Worksheet Assuming CP&P Hourly Contribution of 64.8¢ per hour[1]

1. CP&P contributions to CLPT during the five years ending:

			Source
a.	December 31, 1979	$55,434.607	(J.A.376,1a x .54)
b.	December 31, 1980	$55,460.851	(J.A.376,1a x .54)

2. Aggregate contributions of all employers contributing to CLPT during the five years ending:[2]

a. December 31, 1979 $273,502,478.00 (J.A.376,2a - $47,222.08)

b. December 31, 1980 $320,419,755.00 (J.A.376,2b - $47,244.43)

3. CP&P Percentage of total CLPT contributions:

a.	Divide 1a by 2a	.000202684
b.	Divide 1b by 2b	.000173088

4. CLPT aggregate unfunded, vested liability pools as of December 31, 1980:

a.	Pool as of December 31, 1979	$468,656,500.00	(J.A.58,4a)
b.	Pool as of December 31, 1980	$45,524,700.00	(J.A.58,4b)

---

[1] Cost estimated by CLPT to provide and administer the benefit. CLPT Br. at p. 11.

[2] Total contributions minus the difference between actual contributions by CP&P and contributions assumed in this schedule.

5. CP&P estimated withdrawal assessed before the offset is determined as follows: (J.A.58,5)

a.	Line 3a multiplied by line 4a	$ 94,989.17
b.	Line 3b multiplied by line 4b	7,879.78
c.	Total of 5a and 5b	$102,868.95

6. Offset amount:

– If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.[3]

7. CP&P estimated withdrawal assessment equals line 5c less line 6. $55,737.90[4]

---

[3] J.A. 58-59

[4] If amounts deducted from J.A. 376 line 1a and 1b are also deducted from lines 2a and 2b the formula reduces the line 7 total to $55,702.72.